

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS HAROLD RANDOLPH, JR.,

Defendant-Appellant.

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UNPUBLISHED

September 11, 2003

No. 239151

Oakland Circuit Court

LC No. 2000-174244-FC

Before: O’Connell, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for first-degree premeditated murder, MCL 750.316(1)(a).<sup>1</sup> Defendant was sentenced to life imprisonment for the first-degree premeditated murder conviction. We affirm.

On January 8, 1982, Sharon Randolph was shot and killed in the parking lot outside of the Empress Garden Restaurant in Southfield, Michigan. Defendant contended, in his statements to the police, that a man followed him and his wife, Sharon Randolph, from the Empress Garden Restaurant to their car grabbed him by the collar from behind, placed an object to his neck, and stated if there were no problems nobody would be hurt. Then, according to defendant, the man told him to open the door, the man entered the left rear of the vehicle and pulled Sharon Randolph into the backseat of the vehicle. Defendant’s statement to the police was that he was then hit on the head twice and lost consciousness, but heard what sounded like “firecrackers” in the background. When the police arrived on the scene, Sharon Randolph was in the rear driver’s seat of the vehicle with her head laying on her left shoulder and bleeding from the head. Sharon Randolph died of multiple gun shot wounds.

In 1999, David Hutsell and Sarah Norwood came forward, to the police, alleging that defendant paid their uncle, Shannon, to murder Sharon Randolph, and that Shannon did murder Sharon Randolph. Hutsell testified that he witnessed the murder.

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<sup>1</sup> Defendant was tried in a joint trial with co-defendant Sanirell Shannon, who the prosecution alleged defendant hired to kill Sharon Randolph. Each defendant had a separate jury, and co-defendant Shannon was acquitted by his jury. Shannon is also known as “Gino” and “ Sanirell Vanelli.”

Defendant's first issue on appeal is that he was deprived his right to due process and a fair trial when the trial court permitted an unqualified laywitness to offer expert scientific opinions as to the characteristics and qualities of blood spatter and as to whether the shooting occurred inside or outside of the vehicle. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000) or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

A preliminary issue of law regarding admissibility based upon construction of a constitutional provision, rule of evidence, court rule or statute is subject to a de novo review. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Reversible error may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a), *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993). Thus, a trial court's misidentification of the ground for the admission of evidence does not necessarily require reversal. *People v Vandelinder*, 192 Mich App 447, 454; 481 NW2d 787 (1992). An evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

The defense version of the events surrounding Sharon Randolph's shooting was that she was shot inside of the vehicle, which was inconsistent with the testimony of Hutsell who testified that the shooting occurred outside of the vehicle. The prosecution's version was that the shooting occurred outside of the car, which would coincide with Hutsell's testimony. During the cross-examination of Officer Roger Fleming, the evidence technician at the scene,<sup>2</sup> defendant's counsel asked various question regarding whether there was evidence of bullet holes in the vehicle or any blood found on the ground outside of the car. Defendant's counsel then went on to ask Officer Fleming whether the evidence was consistent with Sharon Randolph being shot outside of the vehicle and Officer Fleming answered in the following colloquial:

Q. You didn't find any evidence consistent with the shooting having occurred out in the parking lot?

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<sup>2</sup> Officer Fleming, as an evidence technician, was to collect and preserve evidence at the scene of the crime. Officer Fleming has criminal justice degree from Michigan State University and a master's degree. While in college and in training to be a specialist, Officer Fleming did theoretical blood spatter work. Officer Fleming taught criminal investigation at the University of Detroit from 1983 until 1998, which included instructing on collecting evidence at a crime scene. From 1986 to 1989, Officer Fleming was the Chief of Police for Mason.

A. I wouldn't say that.

Defense counsel did not receive the answer he wanted from Officer Fleming, and now defendant claims error. Clearly, defendant was hoping that Officer Fleming would testify the evidence was not consistent with Sharon Randolph being shot outside the vehicle. However, defense counsel did not receive the answer sought after and moved on.

On redirect Officer Fleming testified that in his opinion the door was open when the blood got on the outside of the car because the seal of the door would prevent the blood from traveling to the rocker panel and because the blood would be thicker in the cold weather, which would also impede the travel of the blood. The prosecution, during its redirect examination of Officer Fleming, then went back to the question asked by defense counsel in the following colloquial:

Q. Also, you were also asked by Ms. Frankel, I believe the question was: You didn't find any evidence consistent with anything happening, the incident outside of the car. I think your response was, I wouldn't say that. Do you recall that?

A. Yes.

Then, Officer Fleming went on to testify that "I certainly could not exclude the possibility that this violence occurred outside of the car for a number of reasons." In addition, Officer Fleming indicated that the "configuration . . . of that blood spatter evidence on that car door . . . suggests to me that could only have happened outside of the car with that car door open." Further, Officer Fleming testified to how the blood was dripping. The trial court noted that it was not going to strike the testimony with regard to blood and location because it was in response to what was brought up on cross-examination.

Once a defendant raises an issue, he opens the door to a full, and not just selective, development of the subject. *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993). A matter can be put into issue by opening statement, cross-examination, or affirmative evidence. *People v Bates*, 91 Mich App 506, 510; 283 NW2d 785 (1979). The "prosecution is entitled to contest fairly evidence presented by a defendant." *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999).

Defense counsel specifically interjected and raised the issue of Officer Fleming's opinion of whether the shooting took place inside or outside of the vehicle during the cross-examination of Officer Fleming. Moreover, prior to the cross-examination of Officer Fleming, defendant's counsel was pressing and eliciting non-expert opinion testimony from Detective Mario Eovaldi, Southfield Police Department, on cross-examination regarding how the blood got on the rocker panel beneath the back door of the car.<sup>3</sup> Defense counsel continued to question and elicit

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<sup>3</sup> We note that this issue was also interjected by co-defendant Shannon's counsel who, prior to the examination of Officer Fleming, was eliciting testimony from Officer Ronald Griffin, Southfield Police Department, who was not qualified as a blood spatter expert, regarding where  
(continued...)

testimony from Detective Eovaldi with regard to this blood evidence and its connection to whether the shooting occurred inside or outside of the vehicle, leading up to whether or not any of the evidence found would support that the shooting occurred outside of the car. This cross-examination included questions regarding how the blood would travel to the rocker panel of the vehicle. Presumably, defendant did not have a problem with this testimony, which supported his position, as Detective Eovaldi testified that there was no evidence found outside the car to support that the shooting occurred outside of the car.

For the above stated reasons, defendant placed the matter in issue by contributing to it by plan or negligence and has waived appellate review of the admission of the evidence. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Reversible error must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176, (1999). A party waives review of the admission of evidence that he introduced, or which was made relevant by his own placement of a matter in issue. *Knapp, supra* at 378. Defendant "opened the door" to the witness' responses and cannot now complain of an error he precipitated. To hold otherwise would allow defendant to harbor error as an appellate parachute. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991). Therefore, defendant's argument is without merit, as this issue has been waived.<sup>4</sup>

It is unnecessary to address whether the testimony was proper or whether Officer Fleming would be qualified to give expert testimony with regard to blood spatter evidence because even if the testimony was improper, where a defendant raises an improper issue, the courts generally allow the prosecution to respond. Numerous claims that an improper prosecutorial argument caused prejudice have been rejected by the appellate courts of this state where the prosecution was merely responding to an issue first raised by the defendant. See, e.g., *People v George*, 375 Mich 262; 134 NW2d 222 (1965); *People v Modelski*, 164 Mich App 337; 416 NW2d 708 (1987). Given that defense counsel initiated the admission of the testimony in the present case, we decline to find error warranting reversal where the prosecution merely elicited similar testimony meant to counteract the earlier, improper testimony.

Defendant's second issue on appeal is that he was deprived due process and a fair trial by repeated prosecutorial misconduct. We disagree.

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(...continued)

blood was dripping and how blood was dripping on the outside of the car. Presumably, defendant did not have a problem with this testimony which supported his position that the blood leaked from inside the car.

<sup>4</sup> We note that there was other evidence to support that the shooting occurred outside of the vehicle. Hutsell testified that he witnessed the shooting occur outside of the vehicle. Blood was found on the rear outside rocker panel of the vehicle. Officer Griffin testified that when he arrived on the scene he recalls clothing outside of the car door. Detective Eovaldi recalls a knit stocking cap, a purse, and a mitt scarf outside of the car by the driver's rear tire. Officer Fleming indicated that there was a scarf near the rear wheel of the vehicle with the presence of blood on it. Detective Eovaldi also recalls a dark reddish fluid on the scarf that appeared to be blood.

Generally, a claim of prosecutorial misconduct is a constitutional issue that is reviewed de novo, but the trial court's factual findings are reviewed for clear error. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003); *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted). *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id.*

Defendant argues that the prosecution's eliciting testimony involving the blood spatter evidence and deliberate introduction of expert testimony from an unqualified laywitness constituted prosecutorial misconduct. Defendant also argues that the prosecution's exacerbating this alleged error during closing arguments constituted prosecutorial misconduct. As discussed, hereinbefore, defendant raised the issue of Officer Fleming's opinion as to whether the shooting of Sharon Randolph took place inside or outside of the car. There was no prosecutorial misconduct with regard to this issue as defendant opened the door to a full and not just selective development of the subject. *Allen, supra* at 103. Furthermore, defendant has waived the issue by placing the matter in issue by contributing to it by plan or negligence. *Knapp, supra* at 378; *Griffin, supra* at 46.

Defendant also contends that the prosecution made a statement of fact which was unsupported by the evidence when it stated "Sanirell Shannon shot her in the head before putting her in the back seat where she began to bleed." Defendant did not object to this statement made by the prosecution. Unpreserved issues are reviewed for plain error which affected substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.* at 721.

A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *Schutte, supra*, but he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Schutte, supra*. The prosecutor need not use the least prejudicial evidence available to establish a fact at issue, nor must he state the inferences in the blandest possible terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995); *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). There was testimony to support that Shannon shot Sharon Randolph outside of the vehicle, and that she was, subsequently, found inside the vehicle when help arrived. Thus, it is a reasonable inference that Shannon placed her in the vehicle. See *Bahoda, supra*; *Schutte, supra*. Furthermore, any potential error could have been cured by a cautionary instruction if defendant had objected. *Schutte, supra*. Moreover, the jury was instructed on more than one occasion that statements made by the attorneys were not to be considered evidence. Therefore, this alleged instance of prosecutorial misconduct does not amount to plain error that affected defendant's substantial rights.

Defendant next contends that the prosecution committed misconduct when defense counsel for Shannon cross-examined Sarah Norwood, a prosecution witness, concerning a statement she made with regard to discussions between defendant and Shannon about killing Marie Randolph, another wife of defendant. Defendant failed to object and preserve this issue for appeal. As previously noted, unpreserved issues are reviewed for plain error which affected substantial rights, and reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Carines, supra* at 763-764; *Rodriguez, supra* at 32; *Schutte, supra* at 720.

Defendant has failed to cite any authority for his contention that the actions of co-defendant's counsel or any action or inaction of the prosecution with regard to co-defendant's cross-examination of Norwood constituted prosecutorial misconduct. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, we consider the issue abandoned. See *People v Canter*, 197 Mich App 500; 496 NW2d 336 (1992); *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987).

Defendant's third issue on appeal is that the evidence presented at trial was insufficient to support his conviction for first-degree premeditated murder. We disagree.

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998), reversed in part on other grounds 462 Mich 415; 615 NW2d 691 (2000). In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Johnson, supra*; *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). However, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478, amended 441 Mich 1201 (1992); *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002), vacated in part on other grounds \_\_\_\_ Mich \_\_\_\_; 658 NW2d 153 (2003). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Questions of credibility and intent should be left to the trier of fact to resolve. *People Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999); *People v Queenan*, 158 Mich App 38, 55; 404 NW2d 693 (1987). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *Carines, supra* at 757. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

One who procures, counsels, aids or abets in the commission of an offense may be convicted and punished as if he directly committed the offense. MCL 767.39, *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). To support a finding that a defendant aided and abetted a crime, the prosecutor must show that: (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement which assisted the commission of the crime; and (3) the defendant intended the commission of the

crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *Carines, supra* at 757. An aider and abettor's state of mind may be inferred from all the facts and circumstances. *Id.* To sustain an aiding and abetting charge, the guilt of the principal must be shown beyond a reasonable doubt. *People v Barrera*, 451 Mich 261, 294-295; 547 NW2d 280 (1996); *People v DeBolt*, 269 Mich 39, 45; 256 NW 615 (1934); *People v Tanner*, 255 Mich App 369, 419; 660 NW2d 746 (2003). But the prosecutor is not required to identify the principal to charge a defendant as an aider and abettor, and the principal need not be convicted. *Barrera, supra; Tanner, supra*. "Rather, the prosecutor need only introduce sufficient evidence that the crime was committed and that the defendant committed it or aided and abetted it." *Tanner, supra* quoting *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995), overruled in part on other grounds, *Mass, supra* at 627-628; *People v Vaughn*, 186 Mich App 376, 382; 465 NW2d 365 (1990). Thus, an aider and abettor can be convicted despite the acquittal of the principal. See *People v Paige*, 131 Mich App 34, 39; 345 NW2d 639 (1983).

First-degree premeditated murder is a specific intent crime and requires the prosecution to establish that "the defendant killed the victim and that the killing was . . . 'willful, deliberate, and premeditated . . .'" *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002), quoting MCL 750.316(1)(a). To premeditate means that a person thinks about an action beforehand. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Whereas deliberate means to measure and evaluate the major facets of a problem or choice. *Id.* "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Kelly, supra* at 642. Circumstantial evidence may constitute sufficient proof of both premeditation and deliberation. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). To show first-degree premeditated murder, "some time span between [the] initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation." *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979), quoting *People v Hoffmeister*, 394 Mich 155, 161; 229 NW2d 305 (1975). See also *Johnson, supra* at 733 (applying a "second-look" analysis). Intent and premeditation may be inferred from all the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987); *People v Daniels*, 163 Mich App 703, 706; 415 NW2d 282 (1987), and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient, *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

Hutsell and Norwood lived with Shannon in 1982. Shannon and Hutsell knew defendant from Wayne County Community College. Hutsell stated that he heard conversations between defendant and Shannon around a year prior to January 1982, at which time defendant was conveying to Shannon that he was sick of his wife and wanted Shannon to kill her for him. Hutsell also stated that he heard this several times, but thought defendant was joking. Hutsell further stated that, a week before the murder of Sharon Randolph, defendant was at the house where both Hutsell and Shannon lived, and that defendant indicated that he wanted his wife dead for real, and Shannon indicated he would not do it without money. According to Hutsell, an insurance policy was discussed as a way to pay Shannon, and that defendant gave Shannon money in a brown paper bag to start. Norwood also claims she saw Shannon receive money prior to the killing of Sharon Randolph, and heard defendant inform Shannon that he had to wait for the rest of the money. Netherlee Harkins, Shannon's sister and the mother Hutsell and Norwood, testified that sometime prior to the killing of Sharon Randolph, Shannon informed her that defendant wanted Shannon to kill his wife because his wife, Sharon Randolph, was abusing

him. Harkins also testified that Shannon told her that he was going to kill Sharon Randolph to get the insurance money.

Hutsell testified that he drove Shannon to the plaza, where the Empress Garden Restaurant was located, to meet defendant on January 8, 1982. Hutsell further testified that Shannon went into a plaza then came out with defendant, briefly, and then defendant returned to the restaurant. According to Hutsell, Shannon then waited for defendant and Sharon Randolph to come to the car, and when they arrived, Shannon ran over to Sharon Randolph outside of the car and said "die bitch die," and shot her in the face twice. Hutsell stated that he did not see her after the first shot, making him assume she dropped towards the ground. Hutsell indicated that defendant was standing on the other side of the vehicle at the time, and said "how do you want to do this, lets make it look real good," gave Shannon his wallet, and that after this Shannon hit defendant a couple of times with the butt of the gun. Hutsell testified that Shannon ran back to the car with blood spatters on his face instructing Hutsell to drive away. Hutsell indicated that upon returning home, Shannon placed his clothes in a garbage bag, cleaned the gun, and dumped the clothes and then eventually the gun was dumped in the river. Norwood testified that when Shannon returned to the house that night he had blood on his face and upper chest area, and she also saw Shannon get a garbage bag, and heard him yelling for the gun cleaner. Norwood also testified that this same night she saw Shannon with money on the table.

Norwood testified that after Sharon Randolph was killed, Shannon was calling defendant frequently on the phone asking for money, and that defendant said he was waiting for insurance company to pay, and not to call him anymore. Hutsell testified that defendant came over approximately two weeks after the shooting with a briefcase, handed it to Shannon, said here is all of your money, and indicated that he could not come over to the house anymore. Hutsell further testified that Shannon put the money, around \$40,000, in a paper bag. Norwood explained that she recalls defendant giving Shannon a briefcase full of money approximately a week after she saw the blood on his face, and that Shannon transferred this money to a paper bag. Hutsell, Norwood, and Harkins all testified that they recall defendant spending a lot of money around this time period.

Ann Morgan testified that Shannon was staying in her garage during the summer of 1999, and that defendant pulled in the driveway and gave Shannon a ticket, which she assumed to be a ticket to Mississippi. Morgan further testified that defendant and Shannon drove off together. Morgan also testified that she saw defendant on several prior occasions.

Hutsell explained that he did not go to the police prior to December 1999 because Shannon had threatened him, his grandparents, mother, and fiancé. Hutsell further explained that his grandparents were dead and that he had not heard from his uncle for almost a year at the time he gave a statement to the police. Norwood explained that she did not report to the police earlier because her grandmother had made them to promise not to, and she was concerned for her family's safety. Norwood stated that she finally decided to give her statement in 1999 after she was diagnosed with terminal cancer in October 1999. The parties stipulated to the fact that defendant and Sharon Randolph had taken out various insurance policies on each other's lives. Defendant would have been paid proceeds from at least one of the insurance policies.

Prior to the murder of Sharon Randolph, Detroit Police Officer Shannon Remson, whom Sharon Randolph was having an affair with, testified that he observed black eyes and bruises on

her. On August 7, 1981 and on August 9, 1981, police officers answered assault and battery complaints at the home of defendant and Sharon Randolph. Detroit Police Officers Alma Cooper and Scott Roberts observed bruises on Sharon Randolph, and Officer Roberts noticed a cut on her eye. Defendant told Officer Roberts that Sharon Randolph assaulted him on several occasions, which is consistent with the Harkins' testimony that Shannon told her that defendant wanted his wife dead because she was always abusing him.

Under an aiding and abetting theory sufficient evidence has clearly been introduced to support defendant's conviction for first-degree premeditated murder. There is testimony, when viewed in a light most favorable to the prosecution, that defendant contacted and offered Shannon money to kill his wife, they planned how to kill her, and that Shannon did kill defendant's wife, Sharon Randolph. Defendant, on appeal, does not appear to even challenge that there has been evidence to support the first-degree premeditated murder conviction, but rather appears to argue that the evidence was not credible. But this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Wolfe, supra* at 514; *Elkhoja, supra* at 442. Questions of credibility and intent should be left to the trier of fact to resolve. *Avant, supra* at 506; *Queenan, supra* at 55. It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *Hardiman, supra* at 428. All conflicts in the evidence must be resolved in favor of the prosecution. *Terry, supra* at 452. Upon a de novo review, when viewing the evidence in a light most favorable to the prosecution and resolving all conflicts in favor of the prosecution, a rational trier of fact could find that the essential elements of first degree premeditated murder were committed under an aiding and abetting theory. *Johnson, supra* at 723; *Leuth, supra* at 680.

Defendant's fourth issue on appeal is that law enforcement's suppression of impeachment evidence, regarding inducements to a material witness, deprived defendant of his right to a full and effective confrontation of witnesses and of his due process right to a fair trial.<sup>5</sup> We disagree.

A criminal defendant has a due process right of access to certain information possessed by the prosecution. *Brady v Maryland*, 373 US 83, 86-89; 83 S Ct 1194; 10 L Ed 2d 215 (1963). "In order to establish a *Brady* violation, a defendant must prove (1) that the state possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with the exercise of reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v Fox (After Remand)*, 232 Mich App 541, 549; 591 NW 2d 384 (1998).

"This Court's review is generally limited to the record of the trial court, and it will generally allow no enlargement of the record on appeal." *Warren, supra* at 356, citing *Amorello*

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<sup>5</sup> In a supplemental brief, defendant raised various new issues on appeal. The issues raised in this supplemental brief are the same issues raised in defendant's motion to remand and for a new trial, which was denied on May 23, 2003. Defendant also filed a second motion to remand, which was denied September 2, 2003. Consequently, these issues will be decided on the basis of the existing record. *Warren, supra* at 356.

*v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). The record does not support defendant's claim that law enforcement suppression of impeachment evidence regarding inducements to a material witness deprived him of his right to confrontation and to a fair trial. Consequently, defendant has not established error requiring reversal.<sup>6</sup>

Defendant's fifth issue on appeal is that he was denied the effective assistance of counsel for various reasons. We disagree.

Defendant's motions for remand have been denied, thus, when reviewing his claim of ineffective assistance of counsel, this Court's review is limited to the facts contained on the record. *Rodriguez, supra* at 38. If the record does not contain sufficient detail to support a defendant's ineffective assistance of counsel claim, then he has effectively waived the issue. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Id* at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843, 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The deficiency must be prejudicial to the defendant. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). To demonstrate prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

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<sup>6</sup> We also note that defendant's sole offer of proof is the witnesses' equivocal statements about the alleged promise of being entitled to a reward. Even with this on the record a *Brady* violation would not be established as defendant presents no evidence that the prosecution had possession of this evidence, nor is it clear that the defense did not possess the evidence. It appears that the reward referred to was a publicly announced reward offered approximately seventeen years earlier, around the time Sharon Randolph was murdered. As such, this information appears to have been in the public domain and defendant could have made his own inquiries on this issue either at trial or before. Also, the information is not particularly compelling. The problem for defendant, in suggesting that the witnesses' statements were designed to take advantage of the reward, is that they came forward to police after many years and without any prompting. This was so long after the reward offer was made that it would be natural to assume that the reward may no longer be available. Finally, this information would simply be in addition to extensive impeachment evidence introduced against the witnesses. Therefore, there is no reasonable probability that this information would have altered the outcome of the proceedings.

probability is a probability sufficient to undermine confidence in the outcome." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Furthermore, the defendant must overcome the presumption that the challenged action is sound trial strategy. *Daniel, supra* at 58.

There is no showing on the record that but for an error of counsel the result would have been different. Moreover, defendant, an attorney himself, has failed to overcome the presumption that the challenged actions of his team of three attorneys was sound trial strategy. Simply because a chosen strategy is not successful does not render it ineffective assistance. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Based on the record, upon a de novo review of this constitutional issue, defendant has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. *LeBlanc, supra* at 579.<sup>7</sup>

Defendant's final issue on appeal is that he is entitled to a new trial based upon newly discovered information of material inducements promised to witnesses and other significant impeaching and exculpatory evidence. We disagree.

To justify new trial on the basis of newly discovered evidence, the moving party must show that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) including the new evidence on retrial would probably cause a different result; and (4) the party could not with reasonable diligence have discovered and produced the evidence at trial. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). As previously noted, defendant's motions for remand have been denied. Defendant is not entitled to a new trial as our review is limited to the record of the trial court. *Warren, supra* at

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<sup>7</sup> We note that all of defendant's alleged claims of ineffective assistance of counsel appear to be either based on trial strategy or in no way deprived defendant of a substantial defense. With regard to defendant's contention that trial counsel was ineffective for failure to introduce an extortion defense, evidence, witnesses, or object to certain prosecution evidence, it appears that many of trial decisions were made pursuant to information received through conducting mock jury trials and any decision based upon these is clearly trial strategy. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Simply because a chosen strategy is not successful does not render it ineffective assistance. *Kevorkian, supra* at 414-415. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Additionally, some of the objections would have been meritless, and "[a] trial attorney need not register a meritless objection to act effectively." *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Further, there is no showing that any alleged ethical violation would have changed the result of the proceedings. See *Bell, supra*; *Strickland, supra*; *Toma, supra*. Also, there is no indication on the record that defendant, an attorney himself, was denied in any way to present a defense or to testify. Here, defendant points to no evidence to support a conclusion that he ever attempted to exercise his right to testify or that he was unaware of his right in this regard. It must be concluded that defendant waived his right to testify. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985).

356. The record does not support defendant's claim that newly discovered information of material inducements promised to witnesses and other significant impeaching evidence denied him a fair trial. Accordingly, defendant has not established error requiring reversal.<sup>8</sup>

Affirmed.

/s/ Peter D. O'Connell

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder.

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<sup>8</sup> We also note that this issue is without merit as the evidence defendant alleges is impeaching and exculpatory is either cumulative or defendant could have discovered and produced the evidence at trial with reasonable diligence.